

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 23, 2002 Session

IN RE: SHON AUSTIN MARR

CHRISTY RENEE OSBORN v. JUSTIN CHANDLER MARR

**An Appeal from the Chancery Court for Williamson County
No. 28066 Russ Heldman, Chancellor**

No. M2001-02890-COA-R3-CV - Filed January 23, 2003

This case involves the termination of parental rights. The parents of the child lived together but were never married to one another. The father abused the mother on occasion, usually during times in which the father was drinking alcohol. The couple had a son in September 1998. From September 1998 until February 1999, the father and mother lived together. In February 1999, the father pled guilty to and was imprisoned for especially aggravated robbery, a crime committed prior to the birth of the parties' son. In July 2001, the mother filed this petition to terminate the father's parental rights. The trial court declined to do so, finding insufficient evidence that the child would be substantially harmed if the father's parental rights were not terminated. Mother now appeals. We reverse and remand, concluding that a separate showing of substantial harm is not required when grounds for termination exist under Tennessee Code Annotated § 36-1-113(g)(6).

Tenn. R. App. P. 3; Judgment of the Chancery Court is Reversed and Remanded

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Kenneth W. Rucker, Nolensville, Tennessee, for the appellant, Christy Renee Osborn.

Stacey M. Brackeen, Franklin, Tennessee, for the appellee, Justin Chandler Marr.

OPINION

Shon Austin Marr was born on September 10, 1998, to Petitioner/Appellant Christy Renee Osborn ("Mother") and Respondent/Appellee Justin Chandler Marr ("Father"). Father and Mother lived together after Shon was born, but were never married to one another. On February 8, 1999, Father pled guilty to especially aggravated robbery, in violation of Tennessee Code Annotated § 39-13-403, and received a sentence of sixteen years in prison. The crime had been committed prior to

Shon's birth. Father was incarcerated and is now imprisoned at South Central Correctional Facility in Clifton, Tennessee.

For a time after Father became imprisoned, Mother brought Shon to the prison to see him.¹ Father's parents also brought Shon to visit Father at the prison on occasion. These visits eventually stopped. After the visits stopped, Father wrote letters to Shon and to Mother in an attempt to stay in contact with Shon.

Finally, on July 5, 2001, Mother filed a petition to terminate Father's parental rights pursuant to Tennessee Code Annotated § 36-1-113(g)(6). Under that statute, the initiation of termination proceedings may be based on the fact that "[t]he parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court." Tenn. Code Ann. § 36-1-113(g)(6). Counsel was appointed to represent Father.

The trial court held a hearing on October 12, 2001. Mother testified at the hearing, as well as her mother, Patricia Osborn, and her friend, Emily Henson. Mother testified that she had had a relationship with Father for four years beginning when she was sixteen years old and ending when she stopped visiting Father at the prison. Mother is about three years younger than Father. Mother was involved with Father when he committed his crime of especially aggravated robbery in 1997. She became pregnant with Shon while Father was out on bond in 1998.

Mother testified that Father was abusive to her during their relationship. She recounted one occasion on which Father threw an ashtray across the room and cut her in the knee. She described an incident in which Father left her on a street corner wearing nothing but a t-shirt and underwear, and she had to call a friend to pick her up. On another occasion, when it was snowing and Mother was pregnant, Father took all of her clothes off except her underwear and locked her out of the house. Mother claimed that, while she was pregnant, Father "would pin her down on the ground and just time after time hit on [her] stomach over and over again" because he wanted her to have an abortion. On another occasion, Father saw Mother at a gas station talking to a male friend from high school, and he became angry and punched out the windshield of the friend's car. Mother felt that Father's violent episodes were probably all related to his abuse of alcohol.

After Mother became pregnant, she and Father attended childbirth classes together. Father stayed with Mother through the birth. After Shon was born, Father and Mother lived together until Father was incarcerated in February 1999. During the time in which they lived together, Mother worked during the day and Father worked at night, and they shared the responsibilities for taking care of Shon while the other was at work. Mother testified about one incident in which Father allegedly pushed her and slapped her while she was holding Shon. Despite this incident, however, Mother acknowledged that she was not afraid to leave Shon with Father, and that he helped change diapers, helped with feedings, and did "all of those things a normal father would do." While in prison, Father

¹The drive to the prison was about two-and-a-half to three hours long.

sent Mother one check for \$50 to help take care of Shon. Mother conceded that Father was a good parent to Shon.

After Father was incarcerated, Mother occasionally took Shon to visit Father in prison. The visits stopped in late 1999. Mother said that she stopped bringing Shon to visit Father because Shon was getting older and did not need to go to the prison. She admitted that Father sent letters to her and Shon while he was in prison, saying that he was concerned about Shon and that he wanted them to be happy.

At some point after Father was incarcerated, Mother developed a relationship with another boyfriend who lived with her and Shon. She later broke off that relationship, and the ex-boyfriend went to prison. Mother said that she and Shon now live with her mother, Patricia Osborn. Mother testified that she had not spoken to Father in about two years prior to the hearing. Mother explained that she wants Father's parental rights terminated because it would be best for Shon if she and Shon had the same last name.

Mother's close friend, Emily Henson, testified on her behalf. Henson testified that she had known Mother for about ten years, and that the two had been friends since sixth grade. She described Mother's relationship with Father as physically and mentally abusive. She stated that she witnessed some of the incidents recounted by Mother at the hearing. Henson said that she picked up Mother from the street corner when Father had left her in a t-shirt and underwear. She also saw Mother locked out of her house in the snow wearing no clothes.² Henson was with Mother at the gas station when Father punched out the car windshield of Mother's male high school friend. Henson also described an occasion on which she visited Mother at the home of her mother, Patricia Osborn. Henson said that Father was also at Osborn's home, and that he locked himself and Mother in a bedroom and refused to let Mother out to see Henson.

For about a year during Mother's relationship with Father, Henson lost contact with Mother. Henson asserted that the loss of contact was because Father thought Henson was a "bad influence" on Mother. When Mother was seven months pregnant, however, she called Henson, and they remained friends ever since. Henson testified that she was at the hospital when Shon was born. She said that, about an hour after Shon's birth, Father was sleeping in Mother's bed and would not get up so that Mother could get in the bed and rest.

Henson stated that she now sees Mother and Shon almost every day. She described Shon as being happy and full of life, and said that Mother cares for him well. She characterized Mother as a hard worker and said that, despite Mother having been in abusive relationships in the past, she is stronger and would not become involved in such a troubled environment again. Henson acknowledged that she had never seen Father hit Shon, and she conceded Father had been a loving, caring father.

²According to Mother's testimony about this same incident, Mother was wearing only underwear.

Shon's maternal grandmother, Patricia Osborn, also testified on Mother's behalf. She said that she was in contact with Mother during her relationship with Father. Osborn depicted Father as controlling and said that he did not want Mother to spend time with Osborn because she was a "bad influence" on Mother. Osborn testified that she had never seen Father hit Mother, but said that she saw marks on Mother's face, neck, and legs which she believed to be the result of his abuse. She asserted that Father did not want Mother to have an epidural during Shon's birth, and explained that Mother ultimately received the epidural at Osborn's request when Father left the hospital room. She corroborated Henson's assertion that Father refused to get out of the hospital bed after Shon was born so that Mother could rest.

Osborn described her daughter as a wonderful mother. Osborn acknowledged that she had problems raising Mother, and that Mother had in the past been in counseling for abuse of marijuana. Osborn theorized that many of Mother's poor choices stemmed from her own example, because she stayed with an abusive husband for twenty-three years. Osborn noted that she had had little contact with Father in Shon's presence. She described one occasion on which Mother had asked Osborn to pick up Shon from Father because Mother had to work late. When Osborn arrived, the doors were locked, and Father was asleep. Despite Osborn's banging on the door and windows, she could not awaken Father. Osborn said that, in her opinion, Father was not a good parent because he was physically and verbally abusive to Mother, and Osborn could not be sure that he would not hurt Shon. Osborn was also concerned that, because Father had been controlling towards Mother, he would someday try to exert the same type of control over Shon.

Father also presented testimony at the hearing. Father's mother, Judith Marr ("Mrs. Marr"), testified that she helped care for Shon up until May 2000, when she was hospitalized with a prolonged illness and was unable to care for him. Until that time, she had seen Shon regularly and had purchased a child car seat for her car so that she could pick Shon up at day care. Mrs. Marr said that Father asked her to financially support Mother on Shon's behalf. She bought Shon clothes and toys at Christmastime, and took out a life insurance policy on Shon when he was born, just as she did for her own children. Mrs. Marr said that she tried to contact Mother and Shon after her illness, but that she could not because Mother had changed her phone number.

Mrs. Marr testified that she occasionally took Shon to visit Father in prison. Sometimes her husband went along, and sometimes Mother went also. Mrs. Marr said that Mother did not seem afraid for Shon to go to the prison to visit Father. Mrs. Marr asserted that Father has always loved and cared for Shon. She said that she had never seen Father abuse Mother, and opined Father is not a threat to Shon while in prison. She said that Father continued to try to stay in touch with Shon during his imprisonment, and maintained that terminating Father's parental rights would not be in Shon's best interest.

Shon's paternal grandfather, Jeff Marr, also testified at the hearing. He said that he first met Mother on the day of Shon's birth. He said that, after Father's imprisonment, he went with Mrs. Marr, Mother, and Shon to visit Father in prison every other weekend over a three to six-month period. After that, Mr. Marr, Mrs. Marr, and Shon went to the prison only about six times. Mr. Marr

said that he and Mrs. Marr lost contact with Mother because Mother changed her phone number. Mr. Marr testified that his own father, Shon's paternal great-grandfather, started a Roth educational fund for Shon about six months after Shon was born. Mr. Marr described Father as a good parent and said that Father had tried to stay in contact with Shon while in prison.

Finally, Father testified on his own behalf. He confirmed that, prior to Shon's birth, he committed the crime of especially aggravated robbery and that the facts as stated in his guilty plea were true. In his guilty plea, Father admitted that, in an attempt to steal the victim's car, he tried to pull the victim out of the car. When she struggled with him, he hit her in the face, neck, and hand with a broken beer bottle, and drove away, leaving the victim bleeding and unconscious.

Father confirmed Mother's testimony that she became pregnant with Shon while he was out on bond. Father asserted that he attended birthing classes and medical visits, and that he was present at Shon's birth in September 1998. He explained that he did not want Mother to have an epidural during Shon's birth because he and Mother had decided that the drugs could be harmful to the baby. Father testified that, after Shon was born, he and Mother lived together and shared the responsibilities for taking care of Shon. He said that he stayed with Shon while Mother was at work during the day, and that Mother stayed with Shon while Father was working at night.

Father claimed that his relationship with Mother was "normal," though he acknowledged some of the incidents of abuse recounted by Mother. Regarding the incident in which he allegedly left Mother on the street corner, Father stated that "I know I've probably left her there with some clothes on. But as far as with just a T-shirt on, that I don't believe happened." He flatly denied ever punching Mother in the stomach while she was pregnant, and denied trying to hit Mother while she was holding Shon. He acknowledged that he and Mother had an altercation, but asserted that it took place while Shon was on the couch, not in Mother's arms.

Father testified that Shon visited him when he was first imprisoned, but that the visits "kind of fell through" after a time. Father kept a calendar indicating each day on which Shon visited him in prison. He stated that Mother sent Mrs. Marr a picture of Shon while Mrs. Marr was in the hospital in May 2000, but that his only contact with Shon after that was through letters that he wrote to Shon from prison. Father sent Shon letters on his first and second birthdays, telling Shon that he loved and missed him. Father also sent a letter to Mother, telling her that he hoped she was doing well and that they could remain friends. Father sent \$50 to Mother while he was in prison to help with the cost of raising Shon. When asked whether it would be appropriate for Shon to continue visiting him in prison, Father responded that he thought Shon should continue to visit him, but that when he got older, Mother could make that decision. Father testified that he at least wanted Shon to stay in contact with him through pictures and letters and did not want to be taken out of Shon's life completely. Father said that he thought it would be in Shon's best interest for he and Mother to work together to help him maintain contact with Shon. Father said that he would support Shon financially as best he could from prison.

With respect to his behavior in prison, Father acknowledged that he had been written up twice while in prison for disobeying a direct order and for threatening an officer, but claimed that both write-ups were later dropped. Father said that he had become a changed person since the birth of his son. Father asserted that he had not had an alcoholic drink since he was incarcerated, and testified that he attends Alcoholics Anonymous, substance abuse programs, and anger management programs.

After hearing all of the testimony, the trial court denied Mother's petition to terminate Father's parental rights. The trial court found that the statutory ground for terminating parental rights had been met, because Father was in prison under a sentence of more than ten years and Shon was under eight years old at the time he was sentenced. *See* Tenn. Code Ann. § 36-1-113(g)(6). The trial court determined, however, that the evidence did not establish that the continuation of Father's relationship with Shon would threaten Shon's welfare. The trial judge noted that the Tennessee Supreme Court has held that it is " 'beyond question that before a parent's rights can be terminated[,] there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated.' " (Quoting *In re: Swanson (Tennessee Baptist Children's Homes, Inc. v. Swanson)*, 2 S.W.3d 180, 188 (Tenn. 1999)). The trial judge also quoted from a dissenting opinion written by Judge William Koch, in which Judge Koch asserted that " 'it is constitutionally impermissible to sever a parent's connection with his or her child unless there has first been a finding that the continuation of the parent-child relationship threatens the child's welfare.' " (Quoting *In re: Adoption of Female Child, E.N.R. (Reed v. Rose)*, No. 01A01-9806-CH-00316, 1999 Tenn. App. LEXIS 662, at *21 (Tenn. Ct. App. Sept. 29, 1999) (Koch, J., dissenting), *aff'd*, 42 S.W.3d 26 (Tenn. 2001)). Thus, the trial court indicated that its ruling was premised on the understanding that it would be unconstitutional to sever Father's parental rights in the absence of evidence showing that continuation of his relationship with Shon would threaten Shon's welfare.

The trial court then found that terminating Father's rights would not be in Shon's best interest:

In this case the Court is unable to make [] findings [of substantial harm]. But be that as it may, I'm considering all the evidence and the time of the evidence in this case. And I'm considering the statutory factors relative to best interests.

[A]fter considering all the evidence, . . . the Court is unable to find that it will be in the best interest of Shon Austin Marr for [Father's] rights to be terminated. And therefore the Court will be dismissing this petition for termination of parental rights.

The trial court acknowledged the evidence supporting a contrary result:

By saying that, the Court is not condoning any of the conduct that [Father] committed against [Mother]. The Court is not condoning any of the conduct [Father]

committed against the victim in the criminal case. The conduct is atrocious. It's egregious. It's not to be tolerated.

But the Court has to consider all the evidence. The Court has to consider the testimony of the mother concerning what she said when she was asked what was the basis of her claim. The Court has to consider the testimony of [Father] and the statements made by [Father] in his letters which were written before any petition was filed.

And I know this is troubling to the maternal grandmother and troubling to the mother. But we're dealing with a fundamental right and we're dealing with the best interest analysis. And we're dealing with the evidence before the Court.

On October 26, 2001, the trial court entered an order denying Mother's petition for the reasons stated at the conclusion of the October 12 hearing. Mother now appeals.

On appeal, Mother asserts first that the trial court used the wrong legal standard, concluding that Father's parental rights could not be terminated unless it were shown that substantial harm to Shon would result if his parental rights were not terminated. Second, Mother asserts that the trial court erroneously concluded that termination of Father's parental rights was not in Shon's best interest.

Under Tennessee Code Annotated § 36-1-113(c), a parent's rights may be terminated upon the establishment of:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c)(1) - (2) (2001). Because the decision to terminate parental rights involves fundamental constitutional rights, both elements of section 36-1-113(c) must be proven by clear and convincing evidence. *See In re: C.M.R.*, No. M2001-00638-COA-R3-JV, 2002 Tenn. App. LEXIS 105, at *11-*12 (Tenn. Ct. App. Feb. 7, 2002). Clear and convincing evidence "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995). Considering this heightened standard, we review the trial court's findings of fact de novo on the record, with a presumption that the trial court's factual findings are correct. Tenn. R. Civ. P. 13(d); *see In re: C.M.R.*, 2002 Tenn. App. LEXIS 105, at *11-*12; *In re: Copeland (Graham v. Copeland)*, 43 S.W.3d 483, 485 (Tenn. Ct. App. 2000). We review the trial court's conclusions of law de novo, affording those legal conclusions no such presumption of correctness. *In re: Copeland*, 43 S.W.3d at 485.

In this case, it is undisputed that the first requirement of the statute has been met, because statutory grounds for termination exist.³ Tennessee Code Annotated § 36-1-113(g) lists the grounds for termination of parental rights. Those grounds include the following:

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

Tenn. Code Ann. § 36-1-113(g)(6). It is undisputed that Father became confined under a sentence of more than ten years at a time when Shon was less than eight years old. That conclusion, however, does not end our inquiry.

Mother argues that, once the trial court found the existence of a statutory ground for the termination of Father's parental rights, then its analysis should have focused on Shon's best interest. Mother claims that the trial court erroneously placed on her the additional burden of showing that Father was unfit or that substantial harm would result from the continuation of the parent-child relationship. Mother argues that under section 36-1-113(g)(6) a parent is presumptively unfit based on the long period of incarceration when the child is in his or her tender years. Therefore, once the statutory ground is established, the constitution requires nothing more. Thus, Mother maintains, the trial court should have focused on Shon's best interest, considering all relevant factors, particularly those listed in 36-1-113(i). Based on this legal error, Mother argues, the trial court's decision should be reversed.

We are mindful of the heavy presumption that legislation enacted by the Tennessee Legislature is constitutional. The Legislature has the ability to do "all things not prohibited by the Constitution of this State or of the United States." *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782, 788 (Tenn. Ct. App. 1994) (citations omitted). Thus, this Court must uphold legislation enacted by the General Assembly, unless such a law "directly impinges on the state or federal constitution . . ." *Id.* (citation omitted). It is our obligation, when construing a statute, to adopt a construction that upholds the statute and avoids constitutional conflict when "any reasonable construction exists that satisfies the requirements of the Constitution." *Id.* (citation omitted).

The issue of whether a separate showing of substantial harm is required under the statute is a purely legal question, one which we review de novo. As noted by the trial court, the Tennessee Supreme Court has held that "[i]t is . . . beyond question that before a parent's rights can be terminated, there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated." *In re: Swanson (Tennessee Baptist Children's Homes, Inc. v. Swanson)*, 2 S.W.3d 180, 188 (Tenn. 1999). The Court in *In re: Swanson* explained that parental rights arise from the right to privacy, which is guaranteed in both the federal and the

³Only one of the statutory grounds need be established to terminate a parent's rights. *See In re: C.M.R.*, No. M2001-00638-COA-R3-JV, 2002 Tenn. App. LEXIS 105, at *12 (Tenn. Ct. App. Feb. 7, 2002).

Tennessee constitutions. Tennessee courts have defined it as “a parental right to privacy to care for children without unwarranted state intervention unless there is a substantial danger of harm to the children.” *Id.* at 187 (citing *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993)).

Section 36-1-113 of the Tennessee Code Annotated governs the termination of parental rights. As we have stated, subsection (c) requires that the termination of parental rights be based on (1) the establishment of one of the grounds enumerated in the statute, and (2) the conclusion that termination of parental rights is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c)(1)-(2). The statute sets forth the “grounds” for termination of parental rights:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian . . . has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care. . . ;

(3) (A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home.

(4) The parent or guardian has been found to have committed severe child abuse ... or is found by the court . . . to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian;

(5) The parent or guardian has been sentenced to more than two (2) years’ imprisonment for conduct against the child who is the subject of the petition, or for

conduct against any sibling or half-sibling of the child or any other child residing temporarily or permanently in the home of such parent or guardian, which has been found . . . to be severe child abuse . . .;

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

(7) The parent has been convicted of or found civilly liable for the intentional and wrongful death of the child's other parent or legal guardian.

(8) (A) The chancery and circuit courts shall have jurisdiction in an adoption proceeding, and the chancery, circuit, and juvenile courts shall have jurisdiction in a separate, independent proceeding conducted prior to an adoption proceeding to determine if the parent or guardian is mentally incompetent to provide for the further care and supervision of the child, and to terminate that parent's or guardian's rights to the child.

(B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future, and

(ii) That termination of parental or guardian rights is in the best interest of the child.

(C) In the circumstances described under subdivisions (A) and (B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated.

Tenn. Code Ann. § 36-1-113(g)(1)-(8) (2001). The statute also sets forth factors to be considered in determining whether termination of parental rights is in the best interest of the child:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing a safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2001). Since children whose parents are the subject of a petition to terminate parental rights are frequently in foster care, the termination statutes should be read in

conjunction with section 37-2-401(a) and (c) of the Tennessee Code Annotated, which prefaces the Tennessee statutes regarding foster care:

(a) The primary purpose of this part is to protect children from unnecessary separation from parents who will give them good homes and loving care, to protect them from needless prolonged placement in foster care and the uncertainty it provides, and to provide them a reasonable assurance that, if an early return to the care of their parents is not possible, they will be placed in a permanent home at an early date.

* * *

(c) When a parent by such parent's actions or failure to act fails to fulfill such parent's responsibilities as a parent, the court shall consider such conduct in determining whether to terminate parental rights, regardless of whether the parent intended such parent's conduct to constitute a relinquishment or forfeiture of such parent's parental rights. When the interests of a child and those of an adult are in conflict, such conflict is to be resolved in favor of a child, and to these ends this part shall be liberally construed.

Tenn. Code Ann. §37-2-401(a) and (c) (2001). Thus, the statutes on termination of parental rights are established not only to protect a child from a parent who actively abuses him, but also to avoid the harm visited upon a child by spending years in the uncertainty of foster care because his biological parents are unwilling or unable to care for him properly, and yet will not voluntarily relinquish their parental rights so that the child will be available for adoption and a permanent home. Such parents may recognize that they are unable to shoulder the responsibility of caring for the child, but wish for a relationship with the child that does not require caring for the child's needs. The statutory scheme enacted evidences recognition by the Legislature that, unless the parental rights of such a parent can be terminated, a substantial number of children will spend their childhood in foster care, with no possibility of a permanent home.

This topic was discussed in this Court's decision in *Tennessee Dep't of Children's Servs. v. D.G.B.*, No. E2001-02426-COA-R3-JV, 2002 Tenn. App. LEXIS 647 (Tenn. Ct. App. Sept. 10, 2002). In *D.G.B.*, the child at issue, J.E.B., was taken from the custody of his parents when he was almost nine years old, after they had subjected him to years of severe child abuse. *Id.* at *3. At the time of the hearing on the termination of his mother's and father's parental rights, the child was fourteen years old. *Id.* at *6. He had a low I.Q., bordering on retardation, and suffered from learning impairments and emotional trauma from the years of abuse. *Id.* at *4-*5.

At the hearing, the trial court acknowledged the abuse and found that the parents were "incompetent to provide care and supervision for the child. . . ." *Id.* at *11. Under these circumstances, the trial court found that grounds for termination were established under sections 36-1-113(g)(3), (g)(4), and (g)(8). Nevertheless, the trial court found that the child, because of his age and his physical and mental impairments, was not adoptable. *Id.* at *24. In light of this fact, the trial

court concluded that termination of the mother's and father's parental rights was not in the child's best interest, and required the Department of Children's Services to provide support for the parents to have a "meaningful relationship" with the child that apparently did not include the child living with them. *Id.* at *25.

On appeal, this Court found that grounds for termination had been established, in that the evidence supported the trial court's conclusion that the parents were not able to care for the child on a day-to-day basis. *Id.* at *23-*24. The Court then focused on the trial court's conclusion that termination of the parental rights was not in the child's best interest. It said that section 37-2-401(a), quoted above, expressed the Legislature's "clear intent" as to children in such circumstances. *Id.* at *25. The Court observed:

In the instant case, the trial court found - and the evidence does not preponderate to the contrary - that "an early return to the *care* of their parents" was not possible.... This it seems to us is the key to this issue. The legislative intent is not simply to establish a "meaningful relationship" between a child and his or her parents; it is to return the child to the *care* of his parents. This goal is clearly reflected throughout the statutory scheme. *See*, e.g. T.C.A. §§ 36-1-113(g)(3)(A)(i) ("safe return to the care of the parent(s)"), 36-1-113(g)(3)(A)(ii) ("can be safely returned to the parent(s)"), 36-1-113(g)(8)(A) ("to provide for the further care and supervision of the child"), 36-1-113(g)(8)(B)(i) ("provide for the further care and supervision of the child" and "able to assume or resume the care of and responsibility for the child"), 36-1-113(1) ("to be in the home of the parent"), 36-1-113(i)(7) ("to care for the child in a safe and stable manner"), and 36-1-113(i)(8) ("safe and stable care and supervision for the child").

Id. at *26-*27. Thus, the Court found that the "best interests" of the child must be evaluated in light of the statutory purpose of determining whether the child would be able to safely live with the parents. In light of this purpose, the Court concluded that the evidence demonstrated clearly that termination of the parental rights was in the best interest of the child J.E.B. *Id.* at *27.

Keeping in mind the purpose underlying the statutes on termination of parental rights, we must address the issue of whether, once grounds for termination have been established, the trial court must make a separate finding of substantial harm. As noted above, section 36-1-113(c) does not on its face require such a separate finding; the statute requires a finding by clear and convincing evidence that grounds for termination exist, and that termination of the parental rights is in the child's best interest. The issue, then, is whether the Tennessee Constitution requires an additional finding of substantial harm as it pertains to the termination of parental rights based on section 36-1-113(g)(6) regarding a parent's incarceration.

This issue is addressed in a thoughtful and articulate dissent by Judge William Koch in *In re: Adoption of Female Child, E.N.R. (Reed v. Rose)*, No. 01A01-9806-CH-00316, 1999 Tenn. App. LEXIS 662 (Tenn. Ct. App. Sept. 29, 1999), *aff'd*, 42 S.W.3d 26 (Tenn. 2001). In *E.N.R.*, an

incarcerated father appealed the termination of his parental rights. The father asserted that section 36-1-113(g)(6), providing for incarceration as a ground for termination, unconstitutionally deprived him of his fundamental liberty interest in his parental relationship without affording him due process of law. *Id.* at *11. The majority held that the father failed to give the Tennessee Attorney General notice that he was attacking the constitutionality of a Tennessee statute, and that this omission precluded appellate review on this issue. *Id.* at *12-14.

In his dissent, Judge Koch disagreed with the majority's decision not to consider the constitutionality of the statute, but then proceeded to discuss whether the Tennessee Constitution required an individualized finding of substantial harm:

My concern over the court's decision to sidestep Mr. Rose's challenge to the constitutionality of Tenn. Code Ann. § 36-1-113(g)(6) is heightened by the fundamental nature of the rights at stake and by the serious cloud hanging over the challenged statute. Until the constitutional issues surrounding Tenn. Code Ann. § 36-1-113(g)(6) can be fully aired, persons like Mr. Rose, whom some might view as society's detritus, face the almost certain loss of their relationships with their children without a prior in-depth judicial consideration of whether the affected child will be harmed if his or her ties to a parent are not severed. The potential psychological ramifications of severing a child's relationship with a parent are severe enough to require individualized termination procedures that focus chiefly on the relationship between the child and the parent, not merely the parent's status.

Id. at *37-*38. Judge Koch then commented on whether substantial harm is established once grounds for termination have been found to exist:

It is constitutionally impermissible to sever a parent's connection with his or her child unless there has first been a finding that the continuation of the parent-child relationship threatens the child's welfare. *See (In re Adoption of a Female Child) (Bond v. McKenzie)*, 896 S.W.2d 546, 548 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 680 [(Tenn. 1994)]; *Hawk v. Hawk*, 855 S.W.2d 573, 582 [(Tenn. 1993)]. Tennessee's newly minted adoption statutes contain a list of types of parental conduct that will trigger a termination proceeding. *See* Tenn. Code Ann. § 36-1-113(g). The necessary implication to be drawn from this list is that the General Assembly has concluded that the continuation of a child's relationship with a parent who commits any of the acts on the list ipso facto threatens the child's welfare. That rather sweeping conclusion may or may not be true depending on the facts of the case.

Id. at *41-*42.

As noted in *D.G.B.*, however, the focus of the termination statute is on whether the child can safely live with the parent and have his, that is, the child's, day-to-day needs met. *D.G.B.*, 2002

Tenn. App. LEXIS 647, at *26-*27. Some of the grounds, such as abuse of the child, are reasons for which the parent can be faulted. Other reasons, such as a parent's mental incompetence, are reasons for which the parent cannot be faulted, but the result nonetheless is that the child cannot safely live with the parent in such a way that the child's needs will be met. A parent who is incarcerated for a period of ten or more years when the child is eight years old or younger will be *completely* unavailable to care for the child for the majority of his childhood. For a child who is in foster care, failing to terminate the incarcerated parent's parental rights means that the child will spend his childhood in foster care, with no permanent home.

In his dissent in *E.N.R.*, Judge Koch questions the Legislature's "sweeping conclusion" that, in cases in which the statutory grounds have been established, substantial harm results from continuation of the parental relationship. Nevertheless, there can be no question that a child suffers substantial harm from having a parent who will not, or cannot, live with the child and care for the child's daily needs for most of his childhood. Thus, for a child whose parent is incarcerated for ten years or more when the child is young, there need be no further evidence that substantial harm results to the child from that parent's total inability to care for him.

Despite the harm that results to a child from the parent being unavailable to care for him, in a given instance, that harm may be outweighed by the benefit to the child of continuing the parental relationship. Thus, the statute provides that, even if grounds are established, the trial court may determine that termination of the parental relationship is not in the child's "best interests." Tenn. Code Ann. § 36-1-113(c)(2); *see e.g., In Re: D.I.S.*, No. W2000-00061-COA-R3-CV, 2001 Tenn. App. LEXIS 358 (Tenn. Ct. App. May 17, 2001). This does not undermine the legislative scheme under which an individualized finding of substantial harm is not necessary if grounds for termination are established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c). Under these circumstances, and in light of the heavy presumption that a statute enacted by the Legislature is constitutional, we conclude that, where grounds are established pursuant to section 36-1-113(g)(6), regarding incarceration of a parent, a separate finding of substantial harm is not constitutionally required.

In this case, the trial judge clearly required Mother to establish substantial harm, beyond meeting the requirements of the termination statute. Thus, an erroneous legal standard was applied, and the case must be reversed and remanded for the trial court to make a determination of Shon's "best interests" in light of the correct legal standard.⁴

⁴In this case, of course, Shon is not in foster care and failure to terminate Father's parental rights does not result in Shon spending his childhood in foster care. It does, however, prevent Shon from having an adoptive father, should Mother decide to marry. Moreover, despite Father's obvious desire to have a relationship with Shon, Father was incarcerated before Shon could know him, and Mother is under no legal obligation to facilitate Shon's relationship with Father, who admittedly abused her repeatedly.

The decision of the trial court is reversed and remanded for further proceedings consistent with this Opinion. Costs are to be taxed against the appellee, Justin Chandler Marr, for which execution may issue, if necessary.

HOLLY KIRBY LILLARD, J.